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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 284

WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* LAWRENCE PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-0611-12

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vs.

UNITED STATES OF AMERICA *ex rel.* LAWRENCE PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on March 28, 1967.

Opinions Below

The opinion of the United States District Court for the District of New Jersey, *infra*, pp. 1a-8a, is reported as *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966). The *per curiam* affirmance of the United States Court of Appeals for the Third Circuit, *infra*, p. 10a, is reported in 374 F. 2d 472 (3 Cir. 1967).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on March 28, 1967.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Questions Presented

1. Does this Court's decision in *Jackson* v. *Denno* require as a matter of constitutional dimension that the independent hearing into the voluntariness of a confession be conducted outside the presence of the jury?

2. Has the United States Court of Appeals for the Third Circuit erroneously interpreted the rule of *Jackson* v. *Denno* in a manner which directly conflicts with long-established law of the State of New Jersey?

3. If *Jackson* v. *Denno* is to be interpreted as requiring that the hearing into the voluntariness of a confession be outside the presence of a jury, should that interpretation be made retroactive?

4. If the procedure in the present case under which the voluntariness of the confession was heard did violate the rule of *Jackson* v. *Denno*, is it not true that a new hearing on voluntariness and not an entirely new trial would be the appropriate remedy?

Constitutional Provision Involved

The relevant constitutional provision involved in the instant case is Section 1 of the Fourteenth Amendment of the United States Constitution which provides:

"AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The present case has precipitated a very substantial divergence of opinion between the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey. In *State v. Broxton*, —— N. J. —— (decided May 29, 1967—appended hereto), the New Jersey Supreme Court indicated that it would not follow the ruling of the Third Circuit in the case *sub judice*. The decision in *Broxton* has attracted nationwide attention. See 35 *U. S. L. Week* 1185 (June 6, 1967); New York Times (May 30, 1967, p. 9); Newark Evening News (May 29, 1967, p. 1).

Lawrence Pierce (hereinafter referred to as defendant) was indicted by the Grand Jury of Essex County, New Jersey on July 2, 1959, for the crime of robbery (N.J.S. 2A:141-1) while armed (N.J.S. 2A:151-5). Following entry of a plea of not guilty on July 13, 1959, he was tried and convicted before the Honorable James R. Guiliano and a jury in the Essex County Court. He was sentenced on December 15, 1959, to a term of 16 to 23 years in New Jersey State Prison. No appeal was taken from that conviction.

On October 29, 1965, defendant filed a petition for post-conviction relief in the Superior Court of New Jersey. In that petition he alleged, essentially, (1) that he had been coerced into making oral and written statements during the time of his detention by the police department and (2) that the trial court had erred in its charge to the jury. The post-conviction application was considered by the Honorable James R. Guiliano who, on April 22, 1966, signed an order denying relief. Defendant did not appeal from that denial.

On June 6, 1966, defendant filed a petition for a writ of habeas corpus in the United States District Court. In an opinion and order filed September 29, 1966, the Honorable Renyier J. Wortendyke, Jr. granted the writ but stayed its effectiveness "pending a decision of the respondent (here petitioner) to either appeal the order of this Court or grant petitioner (here respondent) an evidentiary hearing on the voluntariness of his confession." On October 3, 1966, petitioner filed a motion for a reargument, which motion was subsequently granted. Following reargument Judge Wortendyke rendered a supplemental opinion and order on October 28, 1966. This latter order granted defendant's application for a new trial. Both orders are reported as *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966) (1a-8a). Following appeal by the petitioner, the United States Court of Appeals for the Third Circuit rendered a *per curiam* opinion of affirmance (374 F. 2d 472 (3 Cir. 1967).) The opinion and judgment of the Court of Appeals were filed on March 28, 1967 (10a, 11a).

During defendant's trial in November of 1959, the State of New Jersey had marked for identification a statement previously given by him. The State offered testimony with respect to the voluntariness of that statement after the

court first asked defense attorney whether there was any objection to the testimony being taken in the presence of the jury. The response to that was, "none whatsoever." The court continued by saying to the defense attorney, "as you know, it can be taken in their presence or out of their presence, and that is a matter of discretion with the Court though I am inquiring of you if you have any objections. If you did I would hear you but I assume you have none." Again counsel replied, "I have none." The testimony with regard to voluntariness was then taken after which the court permitted the statement to be marked in evidence. The jury was told the following:

> "Members of the jury, as I indicated to you previously, where the State offers in evidence a statement the question of voluntariness is for the court to pass upon. The defendant in this case through his attorney contended that the statement was not voluntarily given and offered testimony. He testified, as you will recall, that the reason he gave the statement was that he was beaten by Detective Nisivoccia and that Detective Byrne grabbed him at his privates and because of that he agreed to give a written statement and when he was giving the written statement he testified he didn't know the answers to the questions but, nevertheless, the police put in that statement the facts which you will find contained therein. Now, in a situation of that type, the Court must pass upon the question of voluntariness. I have ruled that the statement was voluntarily given and I have admitted the statement into evidence over the objection of counsel for the defendant.
>
> "Now, what weight and credibility you will give to this statement will be for you to decide. It will be for you to also consider the question of voluntari-

ness together with what weight or credibility you shall give that statement. At the end of the case I will charge you more fully as to the effect of this statement and the law pertaining to this statement."

Reasons Why a Writ of Certiorari Should be Granted

POINT I

The United States Court of Appeals for the Third Circuit has misconceived the holding of this Court in *Jackson* v. *Denno* as constitutionally requiring that the independent hearing into the voluntariness of a confession be conducted outside the presence of the jury.

Prior to the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964), there were several approaches invoked in the various jurisdictions of the United States for determining the voluntariness of a confession. In those states which followed the so-called orthodox view, the issue of voluntariness was wholly for the judge, the jury's function being limited to determining the credibility of the confession. Dean Wigmore supported this view on the theory that voluntariness had to do with admissibility and that the latter was no concern of the jury. 3 Wigmore, *Evidence* (3rd ed. 1940), § 861.

The second approach, called the "New York" rule, left the issue of voluntariness to the jury with instructions to disregard the confession if not found to be voluntary. Under that view the trial judge did not himself decide a disputed issue of fact. It was this approach that was condemned in *Jackson* v. *Denno*, *supra*. The third approach, which received extensive support prior to the *Jackson* case, was called the Massachusetts or "humane" rule.

This required both the judge and jury to pass upon voluntariness, both obligated to reject the confession if found to be voluntary.

While the New York rule was invalidated in *Jackson*, the other two procedural approaches (the orthodox and the Massachusetts rules) seem to have been given this Court's approval. The majority described the New York rule and then, by way of contrast, said:

> "In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, or those following the Massachusetts procedure, under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused, the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record." (*Id.* at pp. 378-79)

In an affirmative sense, this Court ruled that it was both practical and desirable that in "cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence" (*Id.* at p. 395).

Jackson v. *Denno* did not involve the question whether the trial judge may hear the issue of voluntariness in the presence of the jury. In fact, that case involved a situation in which the judge did not try the issue at all, for under the doctrine there applied, the jury alone passed upon voluntariness. It was precisely because the trial

judge did not decide the question that the majority in *Jackson* found the "New York" rule to be invalid. Specifically, the majority believed it to be wrong to leave voluntariness to the jury alone because there was no way to know whether all the jurors found the confession to be voluntary and because there was the danger that a lay person would use the confession even if it were deemed involuntary.

The court below, in embracing the decision of the United States District Court, has held that the Constitution forbids a trial court from hearing the issue of voluntariness in the presence of the jury. The cases which were relied upon by the District Court and by the United States Court of Appeals do not appear to support that proposition of law.

In *United States* v. *Carignan*, 342 U. S. 36 (1951), the alleged error was in the refusal to permit the defendant to testify in the absence of the jury. This Court said no more than the following:

> "The United States concedes in regard to the third issue that the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts. Therefore, the Government makes no objection to the reversal of the conviction on that ground. We think it clear that this defendant was entitled to such an opportunity to testify . . ." (*Id.* at p. 38)

The above-quoted language was not in constitutional terms and went only to the right of the defendant to testify in the absence of the jury. *Carignan* appears to be an expression of the supervisory authority of this Court

over the federal system. It is submitted that so long as constitutional proscriptions are not violated, a state should be permitted to develop workable rules for the conduct of its voluntariness hearings. *Cf. Ker* v. *State of California*, 374 U. S. 23, 34 (1963).

In *United States ex rel. Dickerson* v. *Rundle*, 363 F. 2d 126 (3 Cir. 1966), cited by the United States District Court in its decision here, the situation was precisely the same as in *Jackson* v. *Denno*. In short, the trial court did not pass upon voluntariness, and there, as in *Jackson*, the relief granted was not a peremptory order for a new trial as to guilt, the State of Pennsylvania being permitted first to have a hearing upon voluntariness before a judge.

There is nothing in the case of *Boles* v. *Stevenson*, 379 U. S. 43 (1964), relied upon by the courts below, which holds that the independent voluntariness hearing must be out of the presence of the jury. There this Court merely observed that "the practice in West Virginia, when an objection to a confession is interposed, is to hold a preliminary hearing out of the presence of the jury at which the trial judge fully determines the coercion issue" (*Id.* at p. 45).

While there are a few cases which, in stating the view of *Jackson* v. *Denno*, speak of the trial of the issue in absence of the jury, in each set forth in the opinions below the statement is only casual, and in none was the question here under consideration involved. *Trotten* v. *Stephens*, 241 F. Supp. 33, 47 (E. D. Ark. 1965), affirmed *sub nom. Harris* v. *Stephens*, 361 F. 2d 888 (8 Cir. 1966); *Stewart* v. *Stephens*, 244 F. Supp. 992, 992 (E. D. Ark. 1965). See also *State* v. *Owen*, 96 Ariz. 274, 394 P. 2d 206 (Sup. Ct. 1964); *Commonwealth ex rel. Gaito* v. *Maroney*, 416 Pa. 199, 204 A. 2d 758 (Sup. Ct. 1964).

A study of the jurisdictions following the Massachusetts rule discloses a lack of uniformity on the question of whether the voluntariness hearing should be out of the presence of the jury. In the State of Maryland, a pre-*Jackson* decision, *Baltimore Radio Show, Inc.* v. *State*, 67 A. 2d 497, 509 (Ct. App. 1949), holds that "it is the better practice to exclude the jury, although we have held that *it is not reversible error to deny a motion to exclude the jury, if the court subsequently rules that the confession is admissible.*" (Emphasis added.)

The United States Court of Appeals for the Ninth Circuit held in *Smith* v. *United States*, 268 F. 2d 416, 420 (9 Cir. 1959), that the preliminary hearing on voluntariness could be conducted outside the presence of the jury. But *Smith* rejected a contention on appeal that the court had erred in denying a defense request to exclude the jury. One judge, in a separate opinion, disagreed arguing that the defendant had been prejudiced by not having the hearing outside the presence of the jury.

While the highest court of the State of California has not yet spoken on this subject, there is a decision from an appellate court which holds that *Jackson* v. *Denno* does not require a hearing outside the presence of the jury. In *People* v. *Oats*, 48 Cal. Rptr. 579, 583-84 (Dist. Ct. App. 1966), it was said:

> "The upshot of our interpretation of Jackson v. Denno is that the trial judge is required to determine that constitutional requirements surrounding the making of a confession are proved before he admits the confession, and that the record must reflect this determination; but it does not require that the court hear the foundational evidence out of the presence of the jury unless the defendant so requests and so

companies his request with a showing that evidence proffered or to be adduced is inadmissible as to the question of guilt."

Chief Justice Weintraub of New Jersey recently stated that "the question whether a confession should be heard outside the presence of the jury is troublesome, wholly apart from any constitutional problem * * * when the issue is tried outside the presence of the jury, the issue must then be retried before the jury both under the orthodox and the Massachusetts rules. A replay is rarely satisfactory, for there is absent the freshness of the first cross-examination. Moreover, the burden upon all concerned, principals and witnesses, is substantial, to say nothing of the burden on the judicial process which already moves at a snail's pace in criminal matters." *State* v. *Broxton*, —— N. J. —— (1967).

An interesting problem arises in the event that the defendant makes damaging admissions with respect to voluntariness out of the presence of the jury. May the State prove them on the rerun before the jury? If not, the jury will be using a record different from the one which the trial judge used. These problems demonstrate that there is room for disagreement as to a proper and desirable approach. They also suggest that the issue is not one which the Constitution should be held to settle in only one respect. It would seem that the only constitutional requirement should be that the concept of fundamental fairness be followed. If the defendant has had a fair hearing he has been given as much constitutional protection as is required. This, it would appear, is the holding of *Jackson* v. *Denno*. It is submitted that the court below has, therefore, erroneously broadened the meaning of *Jackson* v. *Denno* and has thus decided an important question of law in a manner inconsistent with the previous holding of this Court.

POINT II

The United States Court of Appeals for the Third Circuit has rendered a decision which stands in direct conflict with established law of the State of New Jersey.

The courts below have struck down New Jersey's established procedure for the determination of the voluntariness of a confession. The decision of the United States Court of Appeals, which affirms that of the United States District Court, is in direct conflict with New Jersey law. It has long been the rule in this State that the trial judge may, in his discretion, try the issue of voluntariness in or out of the presence of the jury. *State* v. *Gruff*, 68 N. J. L. 287, 290 (E. & A. 1902); *State* v. *Fiumara*, 110 N. J. L. 164, 166 (E. & A. 1933); *State* v. *Walker*, 33 N. J. 580, 592 (1960); *State* v. *La Pierre*, 39 N. J. 156 (1963), *cert.* denied, 374 U. S. 852 (1963); *State* v. *Tassiello*, 39 N. J. 282, 291 (1963); *State* v. *Loray*, 41 N. J. 131, 136 (1963); *State* v. *Ravenell*, 43 N. J. 171, 183 (1964), *cert.* denied, 379 U. S. 982 (1965); *State* v. *Cook*, 47 N. J. 402, 411-12 (1966). In the *La Pierre* case, *supra*, the Supreme Court of New Jersey stated:

> "Bisignano asked the trial court to try the issue of voluntariness in the absence of the jury. No reason was advanced for that course, defendant simply contending the jury had to be excused.
>
> "There is disagreement elsewhere as to the propriety of taking the testimony initially in the presence of the jury. See *Meltzer*, 'Involuntary Confessions: The Allocation of Responsibility between Judge and Jury,' 21 U. Chi. L. Rev. 317, 330 (1954); Annotation 148 A. L. R. 546 (1944). The differences may well be influenced by the roles ascribed to

judge and jury in the several jurisdictions. We have but recently reiterated that the subject rests in the sound discretion of the trial court. *State* v. *Walker*, 33 N. J. 580, 592 (1960). We are not dissuaded from that view by the argument here advanced, that a judge may be influenced to admit a confession because, if it is excluded after testimony is taken in the jury's presence, there will likely be a defense motion for a mistrial.

"The question then is whether the trial court misused its discretion. We think it did not. Defendant did not point to a fair need to excuse the jury either throughout or during some stage of the hearing. Nor does it appear that the inquiry was in fact hampered by the jury's presence; and since the confession was later admitted into evidence, it was not harmful that the jury probably surmised at once the nature of the document in question." (*Id.* at pp. 171-72)

It is clear that in New Jersey an involuntary confession must be excluded from evidence, whether in fact it is true or not. *Roesel* v. *State*, 62 N. J. L. 216, 226-27 (E. & A. 1898). The philosophical basis for the rule was society's recognition that no credit should be given to a confession which is "forced from the mind by the flattery of hope or by the torture of fear . . ." *Warickshall's Case*, 1 Leach C. C. 248.

An extensive historical discussion concerning involuntary confessions is contained in the case of *State* v. *Smith*, 32 N. J. 501, 539-44 (1960). In that case a majority of the Supreme Court decided to abandon the prior approach as articulated in *State* v. *Morehous*, 97 N. J. L. 285 (E. & A.

1921), under which New Jersey adhered to the orthodox view, and to adopt the Massachusetts or "humane" view. Chief Justice Weintraub wrote in *Smith*:

> "We believe both judge and jury should operate upon the same standard. The judge should himself try the issue of voluntariness in the preliminary hearing and should exclude the confession if the State fails to prove it to be voluntary, and if he admits it into evidence, he should strike it if at a later stage involuntariness should appear. If the confession is admitted and there is proof as to involuntariness upon which reasonable men may disagree, the court should charge the jury first to consider that issue under instructions outlining the controlling legal principles and to disregard the confession if it finds the State has not proved it to be voluntary. The jury should not at any time be informed of the trial court's finding of voluntariness.
>
> "It is said that if the judge's role is not made final and exclusive, he may shirk his responsibility and abdicate in favor of a jury decision . . . If this be so, the prospect is equally great under the rule we disapprove. We are far from confident that the rule has operated with the perfection attributed to it. At any rate, we are satisfied that justice is better served by the enjoining of both court and jury each to make original findings and to abide by the command of due process that an involuntary confession must be rejected without regard to the truth of its contents." (*Id.* at pp. 559-60)

This Court spoke approvingly of the Massachusetts rule in *Jackson, supra*, and since New Jersey was categorized

as one of those jurisdictions following the Massachusetts rule (see appendix of Mr. Justice Black at p. 419), it reasonably follows that the New Jersey procedure which leaves the matter of the jury's presence to the court's discretion has been inferentially sanctioned by this Court. Of great significance is the fact that the New Jersey procedure affords greater constitutional protection than the orthodox rule would afford since the defendant gets two chances to have the confession deemed involuntary.

In the case *sub judice* the trial judge told the defendant the confession issue could be heard in or out of the presence of the jury and asked whether the defense objected to a hearing in the presence of the jury, to which counsel for defendant replied that he had no objection. The trial judge found the confession to be voluntary, and received it into evidence. The trial occurred prior to *State* v. *Smith, supra,* and hence at a time when New Jersey adhered to the orthodox rule under which the judge, and only the judge, passed upon voluntariness. The trial judge did precisely that, and in harmony with the orthodox view, instructed the jury that it could utilize the same evidence in passing upon the weight and credibility to be given the statement. The courts below not only struck the conviction of defendant Pierce, they also opened the door for what will undoubtedly be a large number of post-conviction petitions involving cases in which the voluntariness of the confession was heard in the presence of the jury.

Following the decision of the courts below, the Supreme Court of New Jersey decided the case of *State* v. *Broxton*, —— N. J. —— (decided May 29, 1967) in which the New Jersey view was again set forth and in which the decision of the United States Court of Appeals in the present case was discussed. In the course of its opinion the Supreme Court of New Jersey stated:

"We cannot find in that case [*Jackson* v. *Denno*] a holding that the Constitution is offended when a judge does what is required of him on a full and unimpeded hearing merely because a jury was present when he heard the testimony. If that is what *Pierce* v. *Pinto* means, we cannot agree with it. We of course are not bound by that decision, *State* v. *Coleman*, 46 N. J. 16, 36 (1965), *cert.* denied 383 U. S. 950, 16 L. ed. 2d 212 (1966), and although we regret a conflict of views between federal and state courts operating within the same territory, yet the primary responsibility for the criminal process in the State is ours and we would be unequal to that responsibility if we did not follow our own reading of *Jackson* v. *Denno*, especially since *Pierce* v. *Pinto* not only gives constitutional moment to something we think it not even a matter of mere error, but also because it applies its view retroactively to a case tried long before *Jackson* v. *Denno*, thereby raising the prospect of unsettling a substantial number of old convictions. In the latter regard we note that in *Sims* v. *Georgia*, —— U. S. ——, 17 L. ed. 2d 593, 598 (1967), the Court said that '*Jackson*, having been decided June 22, 1964, was binding on the court of Georgia in this case, it having been tried October 7, 1964,' thus suggesting that *Jackson* v. *Denno* should have no application to cases tried before the date of that decision. This would accord with the view of *Johnson* v. *New Jersey*, 384 U. S. 719, 16 L. ed. 2d 882 (1966), concerning the retroactive application of *Miranda* v. *Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694 (1966). And finally, if perchance we do misread *Jackson* v. *Denno*, still we could not accept the anomaly cre-

ated by *Pierce* v. *Pinto*, that whereas a trial judge made no finding at all, the constitutional failure will be remedied if a finding of voluntariness is made in a new hearing before a trial court, yet, if the trial court did at the original trial make the findings required by *Jackson* v. *Denno*, then, somehow, the constitutional shortcoming can be remedied only on a retrial of the issue of guilt." (—— N. J. at p. —)

It is seen that not only does the Supreme Court of New Jersey disagree with the court below it is not disposed to follow its ruling. It is apparent that the disagreement between the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey produces an unsettling and disrupting effect upon the orderly administration of criminal justice. For that reason, it is submitted that a decision from this Court is urgently needed in order that the serious questions here involved can be finally resolved. For the convenience and information of this Court, a complete copy of the *Broxton* opinion is set forth in the appendix herein, *infra* at pp. 13a-30a.

POINT III

The United States Court of Appeals for the Third Circuit has formulated a new rule of procedural law, not heretofore the subject of any decision of this Court, and has mistakingly made that rule retroactive in application.

In the case of *Johnson* v. *State of New Jersey*, 384 U. S. 719 (1966) this Court pointed out "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is

based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved" (*Id.* at p. 728).

The procedure which New Jersey follows with respect to the determination of voluntariness of a confession dates back to the year 1960. From 1960 until 1966, the year of the decision in the District Court in the present case, there were certainly hundreds of trials which proceeded under the rule which gave the trial court the discretion to conduct an independent hearing on the voluntariness issue either in or out of the presence of the jury. That procedure was and, it is urged, still is in complete accord with the requirements of the Constitution. While an accurate figure cannot be here advanced, it is reasonable to opine that if the ruling of the courts below is sustained, there will be hundreds of convictions, heretofore unimpeachable, which will be reversed on post-conviction relief. In many of those instances retrials may not be possible, and the defendants will have to be freed. This probability is precisely the kind which was sought to be avoided recently in decisions by this Court dealing with the issue of retroactivity. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *United States, ex rel. Shott*, 382 U. S. 406 (1966). All of those cases draw a distinction between issues relating to guilt and those relating to once-valid procedures now deemed inadequate.

As previously stated, this Court's opinion in *Sims* v. *Georgia*, *supra*, strongly suggests that *Jackson* v. *Denno* should have no application to cases tried before the date of that decision. Chief Justice Weintraub has indicated that this interpretation would appear to accord with

that advanced by this Court in *Johnson* v. *New Jersey*, *supra*, regarding the retroactive application of *Miranda* v. *Arizona*, *supra*.

It is urged that this Court reconsider the decision of the courts below that it is constitutionally wrong for a voluntariness hearing to be held in front of the jury. But if this Court should not be disposed to any change, then petitioner respectfully urges that the rule of law be declared prospective only.

POINT IV

In requiring that there be a new trial on the indictment, The United States Court of Appeals has erroneously broadened this Court's rule of law as set forth in *Jackson* v. *Denno*.

In *Jackson* v. *Denno*, *supra*, the New York procedure was said to be unconstitutional and this Court ruled that the defendant was entitled to a proper hearing on voluntariness. It was stated:

> "It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and prop-

> erly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty . . ." (*Id.* at p. 394).

The courts below concluded that despite the aforequoted language of *Jackson*, the petitioner in the present case must be given a new trial and that the new trial must follow the standards announced by this Court in *Miranda* v. *Arizona*, *supra*. The reason given for this holding is that the trial court communicated to the jury that it had found the confession to be voluntary.

To paraphrase the Chief Justice of New Jersey in *Broxton*, *supra*, it would be anamalous indeed if no new trial were required where a judge made no finding with respect to voluntariness but a new trial were required where he did make a finding and communicated that finding to the jury. It is submitted that the defendant here was afforded every constitutional protection to which he was entitled at the time of his trial. To now require a new trial under the standards of *Miranda* would be to ignore the holding in *Johnson* v. *New Jersey*, *supra*, which made *Miranda* prospective in application. Petitioner was afforded a voluntariness hearing. Surely it is stretching the meaning of due process and fundamental fairness to now speculate that the jury in this case was not equal to its oath and could not independently decide the issue before it. Moreover, the trial court never communicated with the jury as to the substance of the confession. That matter was exclusively the jury's. Stated differently, the guilt-determining process was unaffected by anything the trial judge may have said. The defendant is in no position to show that he was prejudiced or that he should be given an entirely new trial. The image of justice would only be clouded if such a result is permitted.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that *certiorari* should issue to review the judgment of the court below.

Respectfully submitted,

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[APPENDICES FOLLOW]